Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1399

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility and HAROLD SMITH, former Deputy Superintendent of Attica Correctional Facility,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Ernest Montanye and Harold Smith pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, dated December 28, 1976, which on remand of this case from this Court's judgment in *Montanye* v. *Haymes*, 427 U.S. 236 (1976), again reversed the dismissal of the complaint by the United States District Court for the Western District of New York and remanded for trial.

Opinion Below

The opinion of the Court of Appeals is reported at 547 F. 2d 188 and is reproduced herein as Appendix "A".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on December 28, 1976.

Questions Presented

1. Is the decision of this Court in *Montanye* v. *Haymes*, 427 U.S. 236 (1976) dispositive of the entire action so that the Court of Appeals by necessity erred in again remanding this action for trial?

2. Can a prison transfer be challenged as the deprivation of a constitutionally cognizable governmental benefit, and in any event, is the mere allegation by a plaintiff that he believes that the decision was intended to burden a constitutional right sufficient to put it in issue?

Statement of the Case

A. Facts

We adopt the statement of facts set forth by this Court in *Montanye* v. *Haymes*, 427 U.S. 236, 237-238 (1976) (*"Montanye"*) and respectfully refer this Court also to the more detailed chronology set forth in petitioners' brief in that case, pp. 2-3 (Docket No. 74-520).

B. Prior Proceedings

(1) The proceedings and opinion of the District Court are discussed in petitioners' brief in *Montanye, supra,* at pp. 3-5. The District Court held that the complaint failed to state a claim. The unreported opinion appears in the Appendix in *Montanye* (hereinafter "Prior App.") at pp. 24a-27a and is discussed by this Court in *Montanye,* 427 U.S. at 238-240.

Although Haymes' action was commenced *pro se,* he obtained a leading prisoners' rights advocate as his counsel, and the attorney filed a memorandum of law seven months prior to the District Court's decision.* Although Haymes was free to amend his pleading as of right (Fed. R. Civ. P. 15[a]), there was no amendment to the complaint.

(2) The first opinion of the Court of Appeals, *United States ex rel. Haymes* v. *Montanye* (*"Haymes I"*), is reported at 505 F. 2d 977 (Prior App. 28a-39a). The portion of the opinion requiring due process in connection with certain transfers and the judgment remanding for a trial on the reasons for the transfer and its consequences were the subject of this Court's consideration in the *Montanye* case. 427 U.S. 236.

Although the Court of Appeals did not reach Haymes' claim that the confiscated petition was special correspondence protected by an administrative bulletin, it opined that such a document could nonetheless be the subject of the

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* The District Court memorandum was filed with the Clerk in *Montanye* v. *Haymes.*

prison rule which prohibited the rendering of legal assistance without approval. 505 F. 2d at 982.

(3) In *Montanye* v. *Haymes,* 427 U.S. 236, this Court reversed the judgment of the Court of Appeals in *Haymes I,* holding that no liberty or property interest was implicated in the transfer of an inmate among New York's prisons and hence, no process was due. 427 U.S. at 242-244. Haymes' brief in this Court made the same assumption as that propounded in the lower courts—that the transfer was punishment that could not be effected in response to the exercise of constitutional rights (Brief, pp. 20-21 n. 20).

This Court read the complaint much more broadly than the *Haymes I* Court. The complaint was described as alleging:

> "that the seizure and retention of the document, despite requests for its return, not only violated Administrative Bulletin No. 20, which allegedly made any communication to a court privileged and confidential, but also infringed Haymes' federally guaranteed right to petition the court for redress of grievances. It further asserted that Haymes' removal to Clinton was to prevent him from pursuing his remedies and also was in reprisal for his having rendered legal assistance to various prisoners as well as having, along with others, sought to petition the court for redress." 427 U.S. at 238.

The dissent believed that sufficient allegations were set forth to require a trial on the "transfer as retribution" claim and did not understand the majority to disagree. *Id.* at 244. The dissent felt that the Court had explained only why the opinion, not the judgment, should be reversed. *Id.* at 245. Nonetheless, the concluding paragraph of Mr. Justice White's opinion reads (*id.* at 244):

> "The judgment of the Court of Appeals is reversed,

> and the case is remanded to that court for further proceedings consistent with this opinion.
>
> So ordered."

C. The Opinion Below, *"Haymes II"* (The Court of Appeals' Second Decision)

After remand by this Court, the Court of Appeals asked the parties to brief the question of whether there was a genuine issue of material fact raised by the allegation that the confiscated petition was special correspondence protected by departmental rule (5a),* the remaining issue described in the first Court of Appeals opinion (see *ante* at 3-4). Haymes also raised the issue that he was punished for engaging in protected activity, that is, access to the courts and right to engage in collective action to petition for redress of grievances. He claimed that this issue was still open for review, relying on this Court's statement that the complaint protested infringement of his right to petition the court. *Montanye,* 427 U.S. at 238.

The Court of Appeals found that there were genuine issues of fact as to whether the transfer violated Haymes' First Amendment rights or his federally protected right to help inmates prepare habeas corpus petitions (1a).** Despite the fact that the petition was not signed by Haymes and stated no grievances that could be asserted by him, the Court stated that Haymes had First Amendment rights regarding its circulation (2a-3a).*** The Court

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* Numbers in parentheses followed by the letter "a" refer to the Appendix to this petition.

** There was no claim in this case that Haymes was assisting others with habeas corpus applications, rather than federal or state civil rights actions or other civil matters.

*** The petition complained that all 82 signatories (all of whom signed the document within hours of Haymes' removal as law library clerk) were being deprived of legal assistance and judicial access because of Haymes' removal. It also protested the allegedly obstructionist attitude of the guard in charge of the law library. Prior App. 13a.

also held (3a) that Haymes had a federally protected right to assist other inmates in preparation of habeas corpus applications, relying on *Johnson* v. *Avery*, 393 U.S. 483 (1969).*

The Court concluded that it had previously indicated (in *Haymes I*, 505 F. 2d at 981-982) some of the factors to be assessed by the District Court in determining whether the transfer "in fact had consequences sufficiently adverse to be properly characterized as punitive." *Id.* at 981 (3a). This assessment would help the Court to decide if Haymes had been denied a "benefit" for constitutionally prohibited reasons (3a). Quoting *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974), the Court also stated that the hearing (trial) would allow the state to produce evidence on how Haymes' transfer is related to "legitimate goals" of the corrections system (3a-4a). The District Court would then be able to balance First Amendment rights against legitimate government interests (4a).

> "We therefore reverse and remand for a hearing on the reasons for Haymes' transfer and the consequences of the transfer." (4a).

Reasons for Granting the Petition for Certiorari

A. The decision of this Court in *Montanye* v. *Haymes* is dispositive of the entire action and the court below should have affirmed the dismissal of the complaint.

In its first decision in this case, the Court of Appeals remanded the action to the District Court for a trial to

* Unlike the prisoner in *Johnson*, Haymes did not allege that the rule prohibited all legal assistance nor did he claim that no alternative means of legal assistance were available. See 393 U.S. at 484, 488. *Johnson*, of course, specifically approved "reasonable restriction and restraints" on the rendering of legal assistance by prisoners. *Id.* at 490.

ascertain the reasons for the transfer and the seriousness of the consequences of the transfer. *Haymes I, supra,* 505 F. 2d at 981, 982 n. 7; see *id.* at 979. In *Haymes II, supra,* 547 F. 2d 188, the Court of Appeals, while purportedly considering claims not reached in the first opinion, reached exactly the same holding: "We therefore reverse and remand for a hearing on the reasons for Haymes' transfer and on the consequences of the transfer." (547 F. 2d at 192; 4a).

We respectfully submit that this Courts' decision in *Montanye* v. *Haymes, supra,* reversing the judgment and remanding for further consistent proceedings, was dispositive of this action in its entirety. The Court of Appeals erred in reaching the same judgment anew; its judgment should have directed affirmance of the District Court order dismissing the complaint.

In its *Montanye* decision, this Court held that Haymes had no liberty or property interest in his retention at any particular prison in New York State and accordingly no right to invoke the Due Process Clause in connection with a transfer between facilities. The record also indicates that this Court rejected the contention that the Court of Appeals judgment should be upheld because substantive constitutional claims were made in the complaint.

Haymes' attorney specifically argued before this Court that his liberty interest arose from the burdening of substantive constitutional rights under the First, Sixth and Fourteenth Amendments (Tr. 21, 25, 35, 40-41).* This Court recognized that Haymes' attorney was arguing a new theory (Tr. 36, 44) but acknowledged that he could present a new ground to support affirmance of the Court of Appeals judgment (Tr. 36). Counsel asserted that the *Haymes I* Court was concerned about Haymes' conduct leading to the

* Numbers in parentheses preceded by the abbreviation "Tr." refer to the transcript of the oral argument in *Montanye*, held on April 21, 1976.

transfer, not the transfer itself (Tr. 19). He contended that the remand for trial was to give Haymes an opportunity to prove what his conduct was, whether it was protected, whether there was a causal connection between it and the punishment (transfer), and whether he suffered injury (Tr. 19-20, 23, 36, 41). There is no question but that he believed the Court of Appeals to have found colorable substantive claims (Tr. 40-41). The State responded that the complaint did not state any cognizable claim regarding a substantive constitutional right (Tr. 42-46).

Despite explicit argument by Haymes that the burdening of his substantive constitutional right created a liberty interest, this Court found no liberty interest at all in this case. Thus, although Haymes contended that there was a sufficient ground to support affirmance of the remand ordered in *Haymes I*, this Court's judgment by necessity rejected the notion that Haymes could still litigate the issue of his transfer for any of the reasons given in the complaint.

B. Movement from one prison to another, although subjectively perceived as loss, does not involve the deprivation of a constitutionally cognizable governmental benefit and cannot in any event be subject to federal review simply because a plaintiff alleges a belief that the decision was intended to burden some constitutional right.

This Court's judgment in *Montayne* is consistent with applicable law in this area. While this Court has long recognized that the government may not deny a benefit to a person on a basis which infringes on his constitutionally protected interests (e.g. *Perry* v. *Sindermann*, 408 U.S. 593, 597 [1972] and cases cited therein), the common factor in each of these cases is that the benefit is universally identified as valuable (not *de minimis*) and beneficial. E.g. *Perry* v. *Sindermann, supra* (public employment); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969)

(welfare payments); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (tax exemptions).* Absent these characteristics, the affected interest is without constitutional significance.

Under this guideline, the transfer of an inmate to another prison cannot be denominated a governmental "benefit". Retention at a particular institution is characterized by a complete lack of objective standards which would allow us to classify it as beneficial or detrimental. For one inmate, a transfer from Clinton to Attica is "beneficial" because Attica is closer to his family and has a vocational program he desires. For the prisoner whose family is near to Clinton and who is satisfied with the educational program there, the transfer is not beneficial. In these cases and all instances involving transfers, the evaluation can be made individually and subjectively only, while constitutionally cognizable benefits like welfare payments and public employment are universally recognized as beneficial.**

That retention at a particular prison cannot be considered a constitutionally significant benefit, the deprivation of which states a claim for money damages, is a not startling proposition. This Court has often before refused to recognize as constitutionally cognizable deprivations which are undoubtedly perceived as great losses by the claimant. Not every "grievous loss visited upon a person

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* But see *Mt. Healthy City Board of Education* v. *Doyle*, —— U.S. ——, 50 L. Ed. 2d 471, 483-484 (1977) (even if prohibited reason played a substantial part in decision not to renew teaching contract, no constitutional claim stated if board would have reached same decision in any event).

** The requirement that the benefit not be *de minimis* would enter into consideration in cases in which the challenged governmental action took away something uniformly recognized as a benefit (e.g. dessert, a new textbook) but clearly insignificant in constitutional terms.

by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum* v. *Fano,* 427 U.S. 215, 224 (1976). Thus, in the prison context, not all changes in conditions having substantial adverse impact on an inmate are sufficient to invoke the Due Process Clause. *Id.* at 224. See also *Paul* v. *Davis,* 424 U.S. 693, 697 (1976) (apparent *per se* defamation by state official not cognizable); *Board of Regents* v. *Roth,* 408 U.S. 564, 570 (1972) (fear that refusal to rehire state teacher would create future employment problems not cognizable).

The latitude of prison authorities in making discretionary decisions like transfers is "not the business of federal judges." *Meachum* v. *Fano, supra,* 427 U.S. at 228-229. The *Haymes II* decision would permit a deluge of cases based merely on a self-serving allegation by a prisoner that he "believed" a given administrative decision was taken to violate his constitutional rights.* To permit federal court review of the spectrum of otherwise valid decisions which occur daily in a prison would violate the principle of restraint which has been repeatedly enunciated by this Court. E.g. *Meachum* v. *Fano, supra* at 225, 228-229; *Cruz* v. *Beto,* 405 U.S. 319, 321 (1972); *Johnson* v. *Avery, supra,* 393 U.S. at 486. This result should not be allowed to stand.

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* Neither Haymes' complaint or affidavit in rebuttal (Prior App. 2a-6a, 15a-21a) gave any basis at all for his belief that his transfer was intended to infringe on his constitutional rights.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below summarily reversed; in the alternative, plenary consideration should be granted.

Dated: New York, New York, April 8, 1977.

Respectfully submitted,

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Appendix A - Decision of the United States Court of Appeals for the Second Circuit, December 28, 1976.

Rodney R. HAYMES,
Petitioner-Appellant,

v.

Ernest L. MONTANYE, Superintendent, Attica Correctional Facility and Smith, Deputy Superintendent, Attica Correctional Facility, Respondent-Appellees.

No. 20, Docket 74-1208.

United States Court of Appeals, Second Circuit.

Submitted Sept. 23, 1976.

Decided Dec. 28, 1976.

Civil rights action was brought by state prisoner against prison officials for damages for confiscation of "legal petition" which he circulated in custody and for his alleged summary punishment two days later by being transferred to another facility without hearing. The United States District Court for the Western District of New York, dismissed action, and prisoner appealed. The Court of Appeals, 505 F.2d 977, reversed and remanded, and certiorari was granted, 508 F.2d 837. The Supreme Court, 96 S.Ct. 2543, reversed and remanded. On remand, the Court of Appeals, J. Joseph Smith, Circuit Judge, dealing with issues not reached in the previous decision, held that the confiscated document constituted a petition for redress of grievances which was protected by the First Amendment; that petitioner had standing to raise the First Amendment challenge to his transfer; and that, assuming, arguendo, that petitioner was transferred for violating the rule prohibiting inmates from assisting other inmates in preparation of legal papers, he had standing to challenge the rule's constitutional validity.

Reversed and remanded

Before KAUFMAN, Chief Judge, SMITH and TIMBERS, Circuit Judges.

J. JOSEPH SMITH, Circuit Judge:

This case is here on remand from the Supreme Court, *Montanye, Correctional Superintendent v. Haymes*, —— U.S. ——, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976). This court had held that the transfer of Haymes from New York's Attica Correctional Facility ("Attica") to New York's Clinton Correctional Facility ("Clinton") without a hearing violated the fourteenth amendment, and we had therefore reversed the dismissal of Haymes' complaint, pursuant to defendants' motion, by the United States District Court for the Western District of New York, John T. Curtin, *Chief Judge*. 505 F.2d 977 (1974). The Supreme Court reversed and held that the fourteenth amendment does not require an institutional hearing in connection with Haymes' transfer.

We now deal with those issues which it was not necessary to reach in our previous decision. We hold that there are genuine issues of material fact as to whether Haymes' transfer violated either his first amendment rights or his federally protected right to help prisoners prepare habeas corpus petitions. We therefore reverse the district court's dismissal of the complaint and remand for a hearing on the circumstances of the transfer.

I

As the facts are more fully set out in our previous opinion, we summarize them here. On the morning of June 7, 1972 Haymes was discharged as prison librarian at Attica. In the afternoon of June 7 prison authorities took from Haymes a document protesting Haymes' discharge which he had been circulating among the other inmates. It was addressed to Judge Curtin and at the time of its confiscation had 83 signatures. On June 9, 1972 Haymes was transferred to Clinton.

On August 3, 1972 Haymes filed a *pro se* complaint which Judge Curtin correctly

characterized as invoking 42 U.S.C. § 1983 and 28 U.S.C. § 1343. In response to Judge Curtin's show cause order, the defendants filed three affidavits. Haymes then filed an affidavit and amended his complaint. On June 4, 1973 Judge Curtin granted the defendants' motion and dismissed the complaint.

II

In his complaint, after reciting in some detail the events outlined above, Haymes alleged that "all of the above actions already set forth . . . was [sic] the direct result of administrational [sic] reprisals against your petitioner for assisting those inmates contained in Civ. 1972-230 and Civ. 1972-249; for assisting Attica inmate Louis Martinize # 23379 in submitting his application to this court in May, 1972; and from petitioner himself along with those other inmates similarly aggreived [sic], attempting to petition this court for the redress of greivances [sic]."

The affidavit of Edward Brady, Correction Officer at Attica, says Haymes was "relieved of his assignment as law clerk because of his continual disregard for the rules governing inmates and the use of the law library." The affidavit of Harold Smith, Deputy Superintendent at Attica, says "[t]he attached petition . . . was confiscated from inmate Rodney R. Haymes because of the rules and regulations in effect. . . . His circulating the attached petition was in direct disregard of the above rule forbidding legal assistance except with the approval of the Superintendent." The affidavit of Douglas S. Cream, Assistant Attorney General of the State of New York, says the affidavits of Brady and Smith "adequately and fairly answer the claims herein made by the petitioner." We note that none of these affidavits explicitly states why Haymes was transferred to Clinton.

In his affidavit Haymes denied in great detail the statements made in the affidavits by Brady and Smith. Interpreting Haymes' *pro se* complaint and affidavit liberally, *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1971) (per curiam), and *Morgan v. Montanye*, 516 F.2d 1367, 1370 (2d Cir. 1975), *cert. denied*, 424 U.S. 973, 96 S.Ct. 1476, 47 L.Ed.2d 743 (1976), we conclude that there is a genuine issue of material fact as to the reasons for Haymes' transfer. Haymes claims that his transfer was in reprisal for exercising his first amendment rights and his right to help prisoners prepare habeas corpus petitions. "On this claim, the reason for the defendants' action is critical." *Montanye v. Haymes, supra*, dissenting opinion, — U.S. at —, 96 S.Ct. at 2548. We hold that it was error for the district court to dismiss the complaint without giving all parties the opportunity to present evidence on the reasons for Haymes' transfer. *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975), and *Judge v. City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975).

III

On appeal the defendants now argue that Haymes has no standing to assert either a first amendment claim or a claim to help prisoners prepare habeas corpus petitions. Defendants further argue that, even if Haymes has standing, none of his rights was violated by the transfer.

[1, 2] The defendants argue that the confiscated document is a form of legal assistance to inmates—and so subject to Prison Rule 21 [1]—rather than a letter to a public official—and so subject to Administrative Bulletin # 20, ¶ 9.[2] As we said in our previous decision, prisoners cannot classify a document as a letter rather than as legal assistance merely by failing to request

1. Rule 21 of the Inmate's Rule Book says: Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers.

2. Administrative Bulletin # 20, ¶ 9 says: Special correspondence to public officials: You may write to the President of the United States, Members of Congress . . . and to any Judge. . . . The letter will not be read or censored.

relief and by changing the salutation. 505 F.2d 982. On the other hand, in *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Sostre v. Oswald*, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972), 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972), we said "[t]he generous scope of discretion accorded prison authorities also heightens the importance of permitting free and uninhibited access by prisoners to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers." We consider the confiscated document [3] to be a petition for redress of grievances and hence protected by the first amendment, as applied to the states by the fourteenth amendment. *Procunier v. Martinez*, 416 U.S. 396, 406, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Goodwin v. Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972).

[3] In our previous opinion we said that Judge Curtin's disposition of the case "perforce was summary judgment. F.R.Civ.P. 56." 505 F.2d 979. We must therefore view the evidence in the light most favorable to Haymes. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). While Haymes had not signed the petition, a person circulating a petition concerning his own activities frequently does not sign it. It is undisputed that prison officials took the petition from Haymes. Brady's affidavit says one of the inmates who signed the petition had sought legal assistance from Haymes. On these facts Haymes has standing to raise a first amendment challenge to his transfer. Cf. *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

IV

[4] The defendants also claim that Haymes has no standing to vindicate the federally protected right of prisoners to petition courts for a writ of habeas corpus. In *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), as a prisoner who was transferred to a maximum security building for providing legal assistance to other prisoners in violation of a prison regulation, Johnson had standing to challenge the validity of the regulation. Assuming *arguendo* that Haymes was transferred for violating Rule 21, he has standing to challenge its constitutional validity either on its face or as applied to him. *Sostre v. McGinnis, supra*, 442 F.2d 201-202.

V

In our previous decision we indicated some of the factors which should be assessed by the district court in determining whether Haymes' transfer to Clinton "in fact had consequences sufficiently adverse to be properly characterized as punitive." 505 F.2d 981. Such an assessment will help in deciding whether the defendants have denied "a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The hearing will also provide an opportunity for the defendants to present

3. The text of the confiscated document is:
Hon. Judge John T. Curtin:
I am writing to complain that I am now being deprived of legal assistance as a result of inmate Rodney R. Haymes and John Washington being removed from the prison law library.
Since the removal of the above two from the law library, I cannot any longer obtain any legal assistance either in the nature of obtaining the proper applicable case law corresponding with the particular issue contained in my case, as well as assistance in preparing my post-conviction application to the courts.
The major problem and reason for my not being able to obtain legal assistance is a direct result of the attitude displayed by the law library officer whom goes out of his way to circumvent inmates legal assistance.
I feel that this was obviously the same reason why this officer has had Rodney Haymes and John Washington removed from the law library whereby they no longer have proper access to either the law books or myself and the other inmates whom they are legally assisting.
Wherefore, I feel that my constitutional rights to adequate access to the courts for judicial review and redress is being violated as a direct result of the circumstances and conditions herein set forth.

Appendix A.

evidence on how Haymes' transfer is related to "the legitimate policies and goals of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). With a more complete record the district court will then be better able to make the difficult judgment involved "in a case such as this where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.'" *Id.* at 824, 94 S.Ct. at 2805. We therefore reverse and remand for a hearing on the reasons for Haymes' transfer and on the consequences of the transfer.

Reversed and remanded.

Appendix B - Order of the Court of Appeals Requesting Further Briefing on Remand.

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of August, one thousand nine hundred and seventy-six.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge

HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS

Circuit Judges.

Rodney R. Haymes,

Petitioner-Appellant

v.

Ernest L. Montanye, Superintendent, Attica Correctional Facility, and Agent, _____ Smith, Deputy Superintendent, Attica Correctional Facility,

Respondents-Appellees

74-1208

It is hereby ordered that since the Supreme Court's opinion in Montanye v. Haymes, ___ _____U.S. _____, 44 U.S.L.W. 5051 (1976), makes clear that Haymes' transfer without a hearing from Attica to Clinton, even though it may have been punitive in nature, violated no interest protected by the Due Process clause, It becomes necessary for us to consider whether a genuine issue of material fact is raised by the allegation that the confiscated petition was special correspondence protected by Administrative Bulletin #20. The parties are invited to file and serve memoranda on this issue not later than September 7, 1976, and if they so desire, reply memoranda not later than September 14, 1976.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
MAY 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1399

ERNEST L. MONTANYE, *et al.*,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1399

ERNEST L. MONTANYE, *et al.*,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Rodney R. Haymes, a former prisoner in the New York State prison system,[*] hereby opposes the petition for a writ of certiorari filed by petitioners Ernest Montanye and Harold Smith to review a judgment of the United

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[1] The respondent was granted parole and released on April 13, 1976, and presently remains on parole. Although his equitable claims are moot, he also sought monetary damages which survive.

States Court of Appeals for the Second Circuit, *Haymes v. Montanye*, 547 F.2d 188 (2nd Cir. 1976), which judgment was entered after remand of this case from this Court's judgment in *Montanye v. Haymes*, 427 U.S. 236 (1976).

QUESTION PRESENTED

Should this Court review the question of whether a claim under 42 U.S.C. § 1983 is stated by a prisoner who alleges he was punished for exercising his First Amendment right to petition for redress of grievances and his federally protected right to assist other prisoners to prepare habeas corpus petitions, when the court below merely reversed dismissal of a *pro se* complaint and remanded the case for an evidentiary hearing on disputed facts?

STATEMENT OF THE CASE

This Court previously summarized the events leading up to this litigation:

> "On June 7, 1972, respondent Haymes was removed from his assignment as inmate clerk in the law library at the Attica Correctional Facility in the State of New York. That afternoon Haymes was observed circulating among other inmates a document prepared by him and at the time signed by 82 other prisoners. Among other things, each signatory claimed that he had been deprived of legal asistance as a result of the removal of Haymes and another inmate from the prison law library. The document, which was addressed to a federal judge but sought no relief, was seized and held by prison authorities.

> On June 8, Haymes was advised that he would be transferred to Clinton Correctional Facility, which, like Attica, was a maximum security institution. The transfer was effected the next day . . . . On August 3, Haymes filed a petition with the United States District Court which was construed by the judge to be an application under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 seeking relief against petitioner Montanye, the then superintendent at Attica. The petition complained that the seizure and retention of the document, despite requests for its return, not only violated Administrative Bulletin No. 20, which allegedly made any communication with a court privileged and confidential, but also infringed Haymes' constitutionally guaranteed right to petition the court for redress of grievances. It further asserted that Haymes' removal to Clinton was to prevent him from pursuing his remedies and also in reprisal for his having rendered legal assistance to various prisoners, as well as having, along with others, sought to petition the court for redress." 427 U.S. 236, 237-238 (footnote omitted).

The district court dismissed the complaint, although it considered three affidavits from the petitioners, and an affidavit of the respondent in rebuttal. The court of appeals, in its first opinion, reversed, holding that at least two genuine issues of material fact were present in the case. *Haymes v. Montanye*, 505 F.2d 977, 979 (1974).

Because the court of appeals concluded that summary judgment (as they characterized the district court's action) had been improper on the factual issues relating to Haymes' due process claim, it found it unnecessary to consider his

claim that his transfer had infringed upon constitutionally protected activity. *Id.* at 982.

This Court reversed the court of appeals' first decision *because it found the facts as alleged by Haymes presented no due process question:* ". . . the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. The Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive." 427 U.S. at 242. Thus the judgment of the court of appeals was "reversed and remanded . . . for further proceedings consistent with this opinion." *Id.* at 244.

This Court's opinion did not directly address itself to the question of whether or not a trial should be held in the district court on Haymes' claim that his transfer was in retribution for engaging in constitutionally protected activity. The majority opinion did say that: "As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him *and are not otherwise violative of the Constitution,* the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Id.* at 242. (Emphasis added.)

The dissenting opinion stated that the claim by Haymes that he was engaging in constitutionally protected activity remained open:

> "I am persuaded, however, that the allegations of his complaint are sufficient to require a trial of his claim that the transfer was made in retribution for his exercise of protected rights. On this claim, the reason for the defendants' action is critical and the procedure followed is almost irrelevant. I do not understand the Court to disagree with this analysis, and assume that the Court of Appeals, consistently with this Court's mandate, may direct the District Court to conduct a trial." *Id.* at 244 (Stevens, J., dissenting).

On remand, the court of appeals considered ". . . those issues which it was not necessary to reach . . ." in its previous decision and held that there ". . . are genuine issues of material fact as to whether Haymes' transfer violated either his First Amendment rights or his federally protected right to help prisoners prepare habeas corpus petitions." 547 F.2d at 189. The court of appeals remanded the case to the district court for a hearing on those factual questions and it is that decision which the petitioners now ask this Court to review.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The issues presented in the petition are insufficient to warrant plenary review when judged by the standards established in Supreme Court Rule 19. There is no conflict with a decision of another court of appeals or of this Court; there is no unsettled question of federal law which should be decided by this Court; there is no important state question decided in conflict with applicable state law.

The court of appeals decided very little. They merely followed the principle enunciated by this Court in *Haines v. Kerner,* 404 U.S. 519 (1971) (per curiam) in interpreting the respondent's *pro se* complaint and affidavit liberally, and concluded that there were genuine issues of material fact concerning substantial constitutional claims.

They found that the complaint and affidavit stated a cause of action on the claim that state officials had taken certain punitive action against the respondent Haymes in reprisal for exercising his First Amendment right to petition for redress of grievances and his federally protected right to help prisoners prepare habeas corpus petitions.

The petitioners claim that this Court reached and disposed of those issues in its earlier decision, *Montanye v. Haymes, supra,*[2] and that the court of appeals reached the same judgment that it had in its first decision. It is submitted that they err on both counts. It is clear that the court of appeals did not reach the same judgment on the same issues in both decisions for they state in their decision, now sought to be reviewed, that "We now deal with those issues which it was not necessary to reach in our previous decision." 547 F.2d at 189.

This Court in its earlier decision was concerned with the issue of whether a protected liberty interest flowed directly from the Due Process Clause.[3] The majority indicated that it was not reaching the issue of constitutionally protected activity when it said that "As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him

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[2] The petitioners did not make this claim in the court of appeals on remand. They only argued that Haymes had no standing to raise these issues because, although he had prepared and was circulating the petition and the substance of the petition concerned his removal from the prison law library, he had not himself signed the petition at the time of its seizure.

[3] The respondent's brief in that case only mentioned the issue of constitutionally protected activity in a footnote. (Respondent's Brief, pp. 20-21, n. 20 in Docket No. 74-520).

and are not otherwise violative of the Constitution, the Due Process Clause does not itself subject an inmate's treatment by prison authorities to judicial oversight." 427 U.S. at 242 (emphasis added).

The dissenting opinion in *Montanye, supra,* made it quite clear that it understood that this Court agreed with its analysis that the constitutionally protected activity issue had not been reached and that the court of appeals should direct the district court to conduct a trial on this issue, 427 U.S. at 244, which is precisely what the court of appeals did.

Finally, this Court's action in the companion case, *Meachum v. Fano,* 427 U.S. 215 (1976), undercuts the petitioners' theory on their "prior disposition" claim. In *Meachum,* where there is no claim that the prisoners might have engaged in protected activity, this Court merely reversed the court of appeals, while in *Montanye, supra,* this Court reversed the court of appeals *and remanded for further proceedings.* 427 U.S. at 244.

The court below was certainly not breaking new ground, as suggested by the petitioners, when it held that Haymes should have the opportunity to prove his allegation that his conduct in circulating the confiscated document was an attempt to petition for redress of grievances and therefore was protected by the First Amendment. See *Procunier v. Martinez,* 416 U.S. 396 (1974).

This Court has also made it clear that ". . . it is fundamental that access of prisoners to the court for the purpose of presenting their complaints may not be denied or obstructed." *Johnson v. Avery,* 393 U.S. 483, 485 (1969). The Court has just recently reaffirmed ". . . that prisoners have a constitutional right of access to the courts." *Bounds v. Smith,* ___ U.S. ___, No. 75-915 (April 27, 1977). The

Court in *Bounds* again made it clear in discussing *Johnson v. Avery, supra,* and *Younger v. Gilmore,* 404 U.S. 15 (1971), that a state may not by regulation interfere with a prisoner's right of access to the courts. Furthermore, the Court in *Bounds* stated that states were required ". . . to shoulder affirmative obligations to assure all prisoners meaningful access to the courts," slip opinion at p. 8, and that their main concern was ". . . protecting the ability of an inmate to prepare a petition or complaint," slip opinion at p. 12, n. 17. The petitioners attempt to obfuscate the issues with a discussion of due process considerations which are no longer in the case, and thereby avoid the constitutional limits placed on their actions by *Johnson, Younger* and *Bounds.*

Finally, the petitioners appear to argue that there are certain governmental actions which, despite their motivation and their consequences, can never be subjected to judicial scrutiny. They argue, presumably, that they could punitively transfer a prisoner because he was black and the Warden did not like blacks, or because he wrote a letter to his lawyer asking him to institute suit against prison officials. This Court made it clear in *Johnson v. Avery, supra,* that a state could not punish a prisoner for assisting other prisoners with habeas corpus petitions. See also *Bounds v. Smith, supra* and *Procunier v. Martinez, supra* at 421 (state regulation invalidated because it impermissibly burdened the right of access).

Indeed, the Solicitor General conceded in *Montanye v. Haymes, supra,* that certain state action would be improper, irrespective of due process considerations, if the reason for the state action had to do with punishment for the exercise of constitutionally protected rights. (Brief for United States *Amicus Curiae,* 25, n. 12, Docket No. 74-520).

CONCLUSION

For the foregoing reasons, the judgment of the court below was correct, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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